Supreme Court, U.S.
FILED
MAY 31 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1215

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *ET AL.*,
Petitioners,

v.

JOHNSON CONTROLS, INC.,
Respondent.

On Writ of *Certiorari* to the
United States Court of Appeals for
the Seventh Circuit

BRIEF *AMICI CURIAE* OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE ASSOCIATION OF BLACK WOMEN ATTORNEYS, THE COMMITTEE ON WOMEN'S RIGHTS OF THE NEW YORK COUNTY LAWYER'S ASSOCIATION, AND THE NEW YORK CITY COMMISSION ON HUMAN RIGHTS, IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE* 1/

The Association of the Bar of the City of New York is comprised of more than 18,500 lawyers. While most practice in the New York City metropolitan area, the Association has members in every state and in more than 40 countries. The Association has long advocated the elimination of gender-based discrimination in employment, including discrimination based on the capacity to become pregnant. Policies that exclude women based on reproductive capacity frustrate the goal of economic equality for women. If such policies are permitted to stand, as many as twenty million high-paying industrial jobs may be foreclosed to women workers. *UAW* v. *Johnson Controls, Inc.*, 886 F.2d 871, 914 (7th Cir. 1989) (Easterbrook, J., dissenting).

We submit this brief in support of the women workers who are challenging Johnson Controls' policy because we are acutely aware that women lawyers were also at one time barred from pursuing their livelihood. Like the Court of Appeals below, courts barring women from practicing law indulged in a "romantic paternalism" that characterized women as primarily wives and mothers. For example, the Supreme Court of Wisconsin excluded Lavina Goodell because:

> The peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, are surely not qualifications for forensic strife.

In re Goodell, 39 Wis. 232 (1875). And a distinguished member of this Court voted to exclude Myra Bradwell based upon the assumption that most women would marry, and have as their "paramount destiny and mission . . . the noble and benign offices of wife and mother." *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130, 446 (1872) (Bradley, J., concurring).

1/ The parties have consented to the filing of this brief. Letters of consent are on file with the Clerk of the Court.

Discrimination against women in law continued long after the paternalistic rationale for it had fallen into disfavor. Indeed, from 1870, when the Association was formed, until 1937, women were excluded from its membership. 2/ Myriad reasons were given for such discriminatory treatment, but none actually addressed the ability of women to perform as lawyers.

We believe that so-called fetal protection policies are similarly symptomatic of a lingering refusal to concede that women are both able and entitled to choose their own vocations as well as to make decisions about how their employment affects the well-being of their already existing and future children. Masked as a benign effort to protect potential fetuses, Johnson Controls' policy and others like it serve principally to forestall women's struggle for economic equality.

The Association of Black Women Attorneys was formed in 1976 and is comprised of 490 Black women attorneys, law students and other individuals interested in increasing the number of Black women attorneys in New York State. We join this brief on behalf of the women workers challenging Johnson Controls' policy and the decision below upholding it because both severely limit women's employment opportunities in violation of the language and spirit of Title VII.

The Committee on Women's Rights of the New York County Lawyers' Association ("NYCLA") is composed of women and men attorneys who concentrate their efforts on the elimination of discrimination against women. Founded in 1908, NYCLA is a bar association with a membership of approximately 11,000 attorneys, which often participates as *amicus curiae* in litigation directed to furthering women's civil rights.

2/ The Association has gained considerably by admitting women to its ranks. Today, many women are actively involved in the Association's committees. Seven members of the Executive Committee are women, including its Chair, and women lead more than twenty-five standing and special committees.

The New York City Commission on Human Rights ("the Commission") is a local administrative agency charged with eliminating all prohibited forms of discrimination within the City of New York, including gender discrimination in employment. N.Y.C. Admin. Code Sec. 8–101 *et seq.* The Commission adjudicates claims of employment discrimination under local law, and as a section 706 deferral agency, the Commission also adjudicates employment discrimination claims filed under Title VII.

The Commission takes seriously its public charge that all New Yorkers be afforded full employment opportunities free from discrimination on the basis of gender. Thus, the Commission is deeply concerned about the ways in which fetal protection policies reinforce sex-based occupation segregation and thereby exclude women from better paying jobs traditionally held by men.

SUMMARY OF ARGUMENT

Despite the conclusions of federal regulators and health officials that both men and women face hazards to their reproductive systems and other health risks from exposure to lead, the Court of Appeals deferred to Johnson Controls' sweeping decision to exclude only women from lead exposure positions in its battery plant. The breadth of this ban on women workers of "childbearing capacity" is striking. The policy presumes that all women under age 70 are fertile absent medical proof of sterility. It extends even to jobs with no risk of lead exposure, but which might lead to a promotion into such a job.

In upholding this policy, the Court of Appeals specifically distanced itself from the tradition of *Muller* v. *Oregon*, 208 U.S. 412 (1908), which sustained a "protective" labor law curtailing women's work hours. Nevertheless, the decision below is in fact a contemporary version of *Muller* in its acquiescence to outmoded notions about women's reproductive and economic lives, as well as in its selective reliance on science to perpetuate and bolster those notions. Both Johnson Controls' policy and the decision to uphold it resurrect archaic stereotypes that have long since been rejected by Congress, this Court, and the American public.

In language that is now regarded as paradigmatic of stereotypical notions of women workers, the *Muller* Court stated:

> That women's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity, continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of the public interest and care in order to preserve the strength and vigor of the race.

208 U.S. at 421.

Under Title VII, such sexist assumptions about women's "physical structure" and "maternal functions" can no longer serve as justifications for gender-based discrimination. This is true whether the purported focus of concern is "the strength and vigor of the race" or, as here, the health of a statistically improbable fetus.

The *Muller* Court upheld a law limiting women's work hours on the ground that healthy mothers would ensure the health of "future generations." The court below upheld a policy excluding fertile women workers, ostensibly to protect fetal health. Both decisions view women solely in their reproductive capacity, reinforce the notion that women should be childbearers and homemakers, and denigrate women's participation in the workforce. Both decisions assume that only women are responsible for the health and caretaking of future generations. And both decisions reinforce the demeaning perception that women cannot make the decisions that most vitally affect their individual lives as well as the lives of their existing and potential families. Like the court below, the *Muller* court believed that its conclusions were compelled by science. It is now apparent, however, that the *Muller* Court succumbed to myth. Though perhaps less explicitly, the Court of Appeals similarly fell prey to ideas wholly at odds with scientific fact and the reality of women's lives.

As Judge Posner recognized, however, the analogy between *Johnson Controls* and *Muller* is not a perfect one. 886 F.2d 871, 906 (Posner, J., dissenting). Whereas the Oregon legislature believed it was protecting not only the "strength and vigor of the race" but also women, Johnson Controls purports only to protect fetuses.3/ It would thus be a misnomer to characterize Johnson Controls' policy as "paternalistic" toward women: Here, the asserted goal of fetal protection is to be achieved not for women's benefit, but rather at women's expense.

As with the statute sustained in *Muller*, the practical effect of Johnson Controls' policy and the decision upholding it is to deepen sex segregation of the workforce, to deprive women of their livelihood, and to send the message to women that, indeed, their anatomy should be their destiny. Like the statute sustained in *Muller*, the employer policy upheld by the court below cannot coexist with Title VII and the Pregnancy Discrimination Act. *Amici* urge this Court to reverse that decision and to declare all policies that exclude women based upon reproductive capacity invalid *per se* under prevailing law.

3/ Its policy, however, undermines even that goal because it: (1) irrationally applies to only one class of vulnerable individuals; and (2) ignores the importance of women's wages and employee health benefits to fetal health. For further development of the public health issues raised by this case, see Brief *Amici Curiae* submitted by the American Public Health Association and others.

ARGUMENT

I.

JOHNSON CONTROLS' POLICY RESURRECTS HARMFUL STEREOTYPES ABOUT WOMEN WORKERS REMINISCENT OF *MULLER* V. *OREGON*, IN VIOLATION OF TITLE VII.

The assumptions about women's proper place in society that provided the rationale for *Muller* v. *Oregon* are now an illegal basis, under Title VII, for employer decisions. The history of protective labor legislation has taught that even well-meaning statutes, intended to "protect" women and their potential offspring, served to entrench economic inequality between the sexes, placing women not so much "on a pedestal" as "in a cage." Title VII bars not only such statutes, but also employer policies that exclude women based upon their reproductive function.

This case starkly illustrates how reliance on stereotypes of women also harms men. Johnson Controls' policy treats men as though they were invulnerable to the toxic effects of lead, notwithstanding the substantial data to the contrary presented to the court below. The result: Men get less protection, and women get fewer jobs.

A. Title VII Forbids Employers To Exclude Women Workers Based On Stereotypes.

Title VII's plain language forbids employers from discriminating on the basis of sex unless sex is a bona fide occupational qualification ("bfoq"). 42 U.S.C. §2000e-2(e) (1982). In 1978, Congress enacted the Pregnancy Discrimination Act, which amended Title VII to clarify that sex discrimination includes distinctions based on "pregnancy, childbirth, and related medical conditions." 42 U.S.C. §2000e(k). 4/ In

4/ As Justice White and the Chief Justice have recognized, the Pregnancy Discrimination Act "gave added meaning to discrimination on the basis of sex"; and it means exactly "what it says in a situation where it is directly implicated." *California Fed.*

Continued

so doing, Congress rejected this Court's view in *General Elec. Co.* v.*Gilbert*, 429 U.S. 125 (1976), that policies affecting persons with the capacity to become pregnant could be facially "neutral," and made clear that such policies are in fact facially discriminatory against women. 5/

Congress thus recognized that discrimination based on unfounded assumptions about the relationship between women's capacity to bear children and their ability to perform certain work was simply inconsistent with the goal of guaranteeing women's civil rights. 6/ Moreover, Congress recognized that women's capacity to become pregnant had unfairly served as the greatest obstacle to women's full integration into the workplace. 7/

Sav. and Loan Ass'n v. *Guerra*, 479 U.S. 272, 107 S. Ct. 683, 698 (1987) (White J., dissenting). It says that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment related purposes . . . as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. §2000e(k). *See also, Price Waterhouse* v. *Hopkins*, ___ U.S. ___, 109 S. Ct. 1775, 1811 (1989) (Kennedy, J., dissenting) ("by definition sex is the but-for cause of the employment decision" where the basis of the decision is pregnancy).

5/ *Amici* adopt rather than reiterate petitioners' argument with respect to the proper burden of proof under Title VII. Irrespective of the burden of proof adopted by this Court, *amici* believe that Johnson Controls' policy and the lower court's *Muller*-like analysis of that policy are fundamentally at odds with the language and spirit of Title VII.

6/ Amending Title VII, Civil Rights Act of 1964, S. Rep. No. 95-331, 95th Cong., 1st Sess. 2-3 (1977).

7/ That this recognition served as the impetus for the Pregnancy Discrimination Act is apparent from the legislative history:

> Women are still subject to the stereotype that all women are marginal workers. Until a woman passes the child-bearing age, she is viewed by employers as potentially pregnant. Therefore, the elimination of discrimination based on pregnancy in these employment practices . . . will go a long way toward providing equal employment opportunities for women . . .

S. Rep. No. 95-331, 95th Cong., 1st Sess. at 6-7 (1977).

With the passage of Title VII, protective legislation of the kind upheld in *Muller* v. *Oregon* became unenforceable, and sex-specific labor statutes were uniformly struck down. Courts recognized that Congress, in enacting Title VII, established a policy that individuals must be judged as individuals, and not on the basis of characteristics generally attributed to groups defined by sex, race, religion, color or national origin. Courts recognized that protective labor legislation thwarted this goal. *See Rosenfeld* v. *Southern Pac. Co.*, 444 F.2d 1219 (9th Cir. 1971). *See also Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 423 n. 18. (1975).

This Court has often noted the harmful effects of sex stereotyping on women: "[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" *Price Waterhouse* v. *Hopkins*, ___ U.S. ___, 109 S. Ct. 1775, 1791 (1989) (quoting *City of Los Angeles, Dept. of Water & Power* v. *Manhart*, 435 U.S. 702, 707 n.13 (1978)). 8/

8/ In the equal protection context, this Court has repeatedly denounced reliance on "[a]rchaic and overbroad generalizations" about women's "role" as childbearers and the value of women's work. *See Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 725-26 (1982). *See also, Orr* v. *Orr*, 440 U.S. 268, 283 (1979) (noting "inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection"); *Frontiero* v. *Richardson*, 411 U.S. 677, 684-85 (1973) (provision of special benefits has "put women, not on a pedestal, but in a cage."). In *Roberts* v. *United States Jaycees*, 468 U.S. 609, 625 (1984), this Court observed:

> [D]iscrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.

B. Johnson Controls' Policy Impermissibly Relies Upon Misleading Stereotypes Of Women, In Violation Of Title VII.

The stereotypes and generalizations embodied in Johnson Controls' exclusionary policy and reflected in the lower court's opinion include: (1) that all fertile women are likely to become pregnant; (2) that healthy pregnancies depend exclusively upon women; (3) that women's employment and wage-earning are not essential to their well-being or to the well-being of future generations; and (4) that women are incapable of autonomous, ethical decision-making about issues relating to themselves and their families.

The Court of Appeals insists that its decision, unlike *Muller*, is based on "real" differences between men and women. *Johnson Controls*, 886 F.2d at 898. If by "real" the court meant "biological," the distinction is meaningless. *Muller* was also based upon "obvious," "real" differences — differences that Title VII now makes irrelevant, absent a showing that biology is related to ability to perform the job. "Real" or biological differences, upon which stereotypes have been based, have served as the greatest impediment to women's full integration into the workforce. If employers need only invoke "real" differences to justify policies aimed at pregnant or potentially pregnant persons, Title VII will become virtually meaningless for women.

Moreover, even "real" differences between men and women, such as women's greater longevity, do not justify gender-based policies that disregard individual variation among women. This Court has held that Title VII bans the use of accurate, sex-based actuarial tables in setting pension and life insurance rates. *Manhart*, 435 U.S. 702 (1978). Although women as a group live longer than men, the Court held, Title VII requires that employees be treated as individuals. *Id.* at 707-11. *See also*, *Arizona Governing Comm.* v. *Norris*, 463 U.S. 1073, 1084-86 (1983).

Although protective laws and the *Muller* rationale which sustained them are now "museum pieces," *Johnson Controls*, 886 F.2d

at 913 (Easterbrook, J., dissenting), the Court of Appeals' decision below closely parallels Justice Brewer's rationale in *Muller* in its acquiescence to unfounded generalizations about women's lives.

1. As In *Muller*, The Court Of Appeals' Decision Relied On Unfounded Stereotypes About Women's Reproductive Lives.

Perhaps the most compelling indication of reliance on generalizations about women is the extreme over-inclusiveness of the policy itself. 9/ Johnson Controls' policy is unconscionably overbroad. The Court of Appeals' decision fails to take account of social reality in that few women who work at Johnson Controls will actually become pregnant. Whether an individual woman will become pregnant and whether she will bear a child are influenced by various factors, including but not limited to marital status, age, number of existing children, pre-existing medical conditions that might complicate pregnancy, method of contraception, sexual orientation, and attitude toward abortion. Indeed, the birth rate is near zero at age 40, with only a .41 percent probability that a woman between the ages of 40 and 44 will give birth, and a .02 percent probability that a woman age 45 to 49 will give birth in a given year. U.S. Department of Commerce, Bureau of Census, *Statistical Abstract of the United States* 62 (1989) (1986 rates). Moreover, four out of five sexually active, fertile women not seeking pregnancy use contraceptives. 10/ Thus, the generalization that all

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9/ Protective labor laws for women were similarly overbroad. As one scholar has written:

> [T]he reasoning in *Muller* and its successors was as faulty as the laws were overinclusive . . . . [I]t is difficult to see how [women's supposed physical and socioeconomic weaknesses] justified denial of bar admission in 1869 [or] prohibition of night work in 1915 and 1924.

J. Baer, *The Chains of Protection*, at 130-31 (1973) (hereinafter "Baer").

10/ Specifically, 83.2% of sexually active women between the ages of 15-44 of childbearing capacity, who are not intentionally seeking pregnancy, use contraceptives. *See Statistical Abstract* at 66.

women workers are actually or imminently pregnant is simply not a true one; and under Title VII, "[e]ven a *true* generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." *Manhart*, 435 U.S. at 708 (emphasis added).

Moreover, of those women who do become pregnant, most will have blood levels below 30ug/dl; and of those few whose blood levels exceed 30 ug/dl, most will nevertheless bear healthy children. *Johnson Controls*, 886 F.2d at 913 (Easterbrook, J., dissenting). "Concerns about a tiny minority of women cannot set the standard by which all are judged." *Id.* Title VII protects individuals, and "[i]ndividual risks, like individual performance, may not be predicted by resort to classifications proscribed by Title VII." *Manhart*, 435 U.S. at 710. Johnson Controls is thus statutorily prohibited from treating all women workers as though actually pregnant or on the verge of becoming so. [11/]

In concluding that "the risk of transmission of harm to unborn children is confined to fertile female employees," the Court of Appeals simply discredited the scientific evidence before it that was at odds with its stereotypic view of women's reproductive lives. *UAW* v. *Johnson Controls*, 886 F.2d at 890. Although presented with copious evidence that lead is a toxin that affects all human beings, [12/] the court below discounted this evidence as it applies to men. The court thereby

11/ Johnson Controls' policy not only violates Title VII, but it also contravenes the spirit of the Occupational Health and Safety Act, 29 U.S.C. § 651 *et seq.* (OSH Act). The OSH Act requires employers to maintain a workplace "free from recognized hazards that are causing or likely to cause death or serious physical harm," 29 U.S.C. § 654 (a)(1), and authorizes and directs the Secretary of Labor to promulgate health and safety standards to assure "that no employee will suffer material impairment of health or functional capacity . . ." 29 U.S.C. 655 (b)(5). *United Steelworkers of America* v. *Marshall*,

Continued

disregarded the conclusions of the federal agency charged with monitoring workplace safety. The Occupational Health and Safety Administration ("OSHA") has announced that "because of the demonstrated adverse effects of lead on reproductive function in both the male and female as well as the risk of genetic damage of lead on both the ovum and sperm, OSHA recommends a 30ug/100g maximum permissible blood level in both males and females who wish to bear children." 29 C.F.R. § 1910.1025, Appendix A, p. 185 (1989).

By excluding women instead of making the workplace safe for men's reproductive systems as well as women's, Johnson Controls fails adequately to protect either men or men's potential offspring. [13/] Men thus continue to face reproductive risks, and both they and their potential children may face other health risks associated with lead.[14/]

647 F.2d 1189, 1256 n.96 (D.C. Cir. 1980) *cert. denied*, 453 U.S. 913 (1981) (OSHA has authority to promulgate occupational standards that undermine the use of exclusionary policies.) *But see Oil, Chemical and Atomic Workers Union* v. *American Cyanamid*, 741 F.2d 444 (D.C. Cir. 1984) (OSH Act's "general duty clause" does not prohibit the use of exclusionary policies).

12/ *See, e.g.*, Deposition of Silverstein, Record at pp. 9–14 (both men and women suf fer effects of lead exposure); Deposition of Legator, *Id.* at pp. 15–25, 90–95 (effects of lead exposure on male reproductive system: spontaneous abortion; chromosomal damage; behavioral anomolies in offspring; teratospermia; effects on spermatogenesis). The court ignored this evidence on the ground that it was based on animal studies, despite significant testimony that animal studies are relevant to the human experience and that human epidemiological data also confirmed the animal studies. *See* Deposition of Silverstein, *Id.* at pp. 17–19; Deposition of E.K. Silbergeld, *Id.* at 43–44. Note that the Court of Appeals itself relied on animal data in concluding that lead poses a risk to the fetus in utero, since some of the expert opinion it cited was based on animal studies. *See, e.g.*, Deposition of E.K. Silbergeld, *Id.* at pp. 49–52.

13/ The importance of men's labor is generally assumed. Therefore, men either remain employed, as here, under conditions hazardous to their health, or the workplace is restructured so they can continue working. For example, in 1977, it was found that men who worked with the pesticide Dibromochloropropane ("DBCP") suffered from low and zero sperm counts. Studies showed DBCP to be carcinogenic in animals and capable of causing genetic disease. DBCP was therefore excluded from the workplace, not men. J. Bertin, *Reproductive Hazards in the Workplace*, Reproductive Laws for the 1990s, Cohen & Taub, eds., at 280 (1989).

14 Lead exposure poses risk to the heart, brain, kidneys, liver, and the nervous system. *See* 29 C.F.R. § 1910. 1025, Appendix A.

Similarly, the *Muller* Court read and considered the now famous brief submitted by Louis D. Brandeis and Josephine Goldmark, which included evidence that excessive working hours are harmful to men and women. [15/] The *Muller* Court nevertheless concluded that there were scientific reasons for limiting women's employment. The "science" relied upon in *Muller* now seems like a relic. [16/] Summarizing the Brandeis/ Goldmark brief, the *Muller* Court stated:

> The reasons for the reduction of the working day to ten hours — (a) the physical organization of women, (b) her maternal functions, (c) the rearing and education of children, (d) the maintenance of the home — are all so important and so far reaching that the need for such reduction need hardly be discussed.

15/ See, e.g., *Brief for Defendant in Error, Muller* v. *Oregon*, No. 107, U.S. Supreme Court, October Term, 1907 at 24-26.

16/ For example, the Brandeis/Goldmark brief, quoting from Report of the Maine Bureau of Industrial Labor and Statistics, at 142 (1888), argued that:

> Woman is badly constructed for the purpose of standing eight to ten hours upon her feet. I do not intend to bring into evidence the peculiar position and nature of the organs contained in the pelvis, but to call attention to the peculiar construction of the knee and the shallowness of the pelvis, and the delicate nature of the foot as part of a sustaining column. The knee joint of the woman is a sexual characteristic. Viewed in front and extended, the joint in but a slight degree interrupts the gradual taper of the thigh into the leg. Viewed in a semi-fixed position, the joint forms a smooth ovate spheroid. The reason of this lies in the smallness of the patella in front, and the narrowness of the articular surfaces of the tibia and femur, and which in man form the lateral prominence, and this is much more perfect as a sustaining column than that of a woman. The muscles which keep the body fixed upon the thighs in the erect position labor under the disadvantage of shortness of purchase, owing to the short distance, compared to that of a man, between the crest of the ilium and the great trochanter of the femur, thus giving to man a much larger purchase on the leverage existing between the trunk and the extremities. Comparatively the foot is less able to sustain weight that of a man, owing to its shortness and more delicate formation of the tarsus and metatarsus.

Brief for Defendant in Error, *Muller* v. *Oregon*, No. 107, U.S. Supreme Court, October Term, 1907, at 19.

208 U.S. at 419, note.

Although the prejudice is more subtle in *Johnson Controls*, the court's selective use of scientific evidence to bar women's employment is really a contemporary version of *Muller's* distortion of science to bolster prevailing prejudices of the day. [17/]

2. As With Muller, The Court Of Appeals' Decision Causes Women Serious Economic Harm.

The Court of Appeals' disproportionate focus on women's reproductive capacity results in a view of women as marginal, nonessential members of the workforce. The notion that women should sacrifice their economic livelihood to further the apparent goal of enhancing fetal health implies that "the interests of the next generation always trump the interests of living women." *Johnson Controls*, 886 F.2d at 913 (Easterbrook, J., dissenting).

The Court of Appeals' "balancing" of the interests of the employer, the employee, and the fetus, is fundamentally misguided. First, Title VII has already struck that balance in favor of the employee. Second, it is both irrational and counterproductive, from a public health point of view, to pit woman against fetus, as though their interests were adverse. Women who want children want healthy fetuses and often take great risks to ensure the well-being of their future children. [18/] Third, women's fundamental interest in self-determination is entirely missing from the court's balancing process. The suggestion that employers may properly substitute their judgment for a woman's when it comes to the care of her potential

17/ Scholars have observed that the way science is used is itself often suffused with value judgments and prejudice. *See, e.g., Men's Ideas, Women's Realities: "Popular Science" 1870 to 1915*, L. Newman, ed., (1984); S. Gould, *The Mismeasure of Man* (1981).

18/ *See generally*, Gallagher, *Prenatal Invasions and Interventions: What's Wrong with Fetal Rights*, 10 Harv. Women's L. J. 9 (1987).

offspring or her need for employment, is both humiliating and insulting to women.[19]/

The degree to which the court below underestimates the importance of a woman's employment to herself, her family and to society, is apparent from the language it uses in characterizing women's interest in work: Most women, as most men, do not work simply because of an "interest in financial reward"; nor are most women merely secondary wage-earners who work merely "because of their desire to better the family's station in life." *Johnson Controls*, 886 F.2d at 883 and 897, respectively. Rather, most women work because they must. The court's implication that women work merely to supplement the income of a male wage-earner is disturbingly reminiscent of a time when it was thought that many women worked to earn "pin money." [20]/

19/ Women are certainly no less capable than men of taking the precautionary measures required by OSHA to avoid excessive blood levels. The mandatory training program instructs men and women who work in lead exposure positions as to the purpose, proper selection, fitting, use, and limitations of various protective equipment, including respirators and special clothing. 29 C.F.R. § 1910. 1025(1). All employees are further informed that any employee may be removed from work if and when the average of three consecutive blood sampling tests show a lead level at or above 50 ug/100g of whole blood. 29 C.F.R.§ 1910. 1025(k)(2). Thus, both men and women have the information with which to make responsible decisions, and " [n]o legal or ethical principle compels or allows Johnson to assume that women are less able than men to make intelligent decisions about the welfare of the next generation..." *Johnson Controls*, 886 F.2d at 913 (Easterbrook, J., dissenting).

20/ At the close of World War II, the Labor Department embarked on a campaign to convince women to relinquish their jobs to make room for the newly returned veterans and other "necessary" workers. As part of its 18-point program for "transition to a peacetime economy," the Labor Department set out to "retir[e]" women who were merely pin-money workers and come into the labor market only because of the war need, in order to make opportunity for girls who must work regularly." Ravalt, The Equal Rights Amendment and the Draft, National Business Women (November 1972), citing the New York Times, June 2, 1944, p. 10 (quoted in B. Babcock, A. Freedman, E. Norton, S. Ross, *Sex Discrimination and the Law*, 260 (1973) (hereinafter "Babcock").

Johnson Controls' policy causes the same adverse economic consequences for women brought about by protective labor laws. [21]/ Social reformers who supported such laws sought to improve women's lot; however, "special" laws for women reinforced stereotypes of women as wives and mothers, and devalued their importance as wage-earners. [22]/ In addition to solidifying gender segregation in the workplace, protective legislation effectively excluded women from "male" occupations and from promotion opportunities, [23]/ depressed wages in women-intensive jobs, [24]/ and limited women's earning capacity. [25]/ Even with the aid of Title VII and other legislation, women today are far from achieving economic parity with men. [26]/

21/ It is no accident that employer policies excluding women based on reproductive capacity arise in industries in which women's labor is perceived as expendable. Becker, *From* Muller *v.* Oregon *to Fetal Vulnerability Policies*, 53 U. Chi. L. Rev. 1237-38 (1986). As Becker points out, employers have an economic incentive for perpetuating the marginality of women workers in traditionally male industries. Hiring women often requires making accommodations that cost money, and men are frequently hostile to nontraditional women workers. *Id.* at 1240. Jobs for which women are considered marginal often offer better wages and benefits than jobs in women-intensive industries. It is thus ironic that fetal "protection" policies are most likely to arise "only when the dangerous job offers a real advantage to the women and their living and potential children." *Id.* at 1243.

22/ A. Kessler-Harris, *Out to Work* at 180, 184-185 (1982) (hereinafter "Kessler-Harris"); Baer, *supra* note 9, at 95; Babcock, *supra* note 20, at 27-35.

23/ E.F. Baker, "*Protective Labor Legislation*" 116 Col. U. Studies in Hist., Econ., and Pub. L. 201, 554, 564, 625-26. According to a 1967 survey of 78 companies, 18% of respondents reported that they did not hire women because of state protective laws. Bureau of National Affairs, Personnel Policies Forum, Survey No. 80, Sex and Title VII (April 1967), p. 7.

24/ M. Landes, *The Effect of State Maximum Hours Laws on the Employment of Women in 1920*, 88 J. of Pol. Econ. 476 (1980).

25/ Kessler-Harris, *supra* note 22, at 190, 193-94.

26/ *See* Women's Bureau, Office of the Secretary, U.S. Dep't of Labor, Fact Sheet No. 88-2, *Facts on Women Workers* (1988).

The *Muller* decision did not take into account women's individual interests at all, because it simply assumed that women's interests and those of "the race," were identical, just as it assumed that "women" were synonymous with "mothers." 208 U.S. at 421. *Muller* thus "declare[d] that women may be denied rights which men enjoy . . . in the interest of the larger society." [27/] Similarly, the court below discounted women's autonomy interests, noting in passing that "[m]ore is at stake in this case than an individual woman's decision . . ." *Johnson Controls*, 886 F.2d at 897. The court concluded that the burden should fall upon women, but not men, to sacrifice their livelihood to "protect[ ] the offspring of all employees." Id. at 885 (quoting *Hayes* v. *Shelby Memorial Hosp.*, 726 F.2d 1543 (11th Cir. 1984)). However, Title VII requires, and good public policy counsels, that the woman remain the locus of decision-making in weighing the risks and benefits of employment to herself, her dependents, and her potential children. [28/]

In considering whether feasible alternatives existed to Johnson Controls' policy, the Court of Appeals quoted, no fewer than five times, the admonition that "courts are generally less competent than employers to restructure business practices . . ." *Johnson Controls*, 886 F.2d at 892, 893, 897, 901 (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978)). *Amici* respectfully submit that neither courts nor employers are better situated or more competent than individual women workers to make the decisions that most vitally affect their lives and the lives of their existing and potential families.

27/ Baer, *supra* note 9, at 65.

28/ As discussed earlier, OSHA mandates that men and women in lead exposure positions be provided with information and training, so that they may act responsibly. *See supra* note 19, and accompanying text.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that petitioners' relief be granted.

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